CITATIONS TO OPINIONS BELOW

The per Curiam Opinion of the Court of Appeals of Maryland is reported at 240 Md. 744, 215 A2d 755, characterizes the Petitioner's constitutional questions as "frivolous" (last sentence, second paragraph), and states that the Commissioner's rulings "did not affront any right of the appellant" (last sentence of the Opinion). The full Opinion is set forth in the Appendix hereto, at pp. 1A to 4A.

The Opinion of the Baltimore City Court is printed in the Appendix hereto at pp. 4A to 7A, and that of the Commissioner of Personnel at pp. 7A to 13A.

JURISDICTION

The final judgment of the Court of Appeals of Maryland, the court of last resort of that state, was embodied in its "Mandate", filed February 7, 1966, (see Appendix hereto p. 1A) and entered the same day. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1257 (3), there having been drawn in question below, and the Petitioner claiming here, denial of rights, privileges and immunities secured by the First and Fourteenth Amendments to the United States Constitution, as well as the validity of a State statute *as enforced,* (the Statute setting up the right to a hearing before the Commissioner of Personnel), on the ground of its being repugnant, as applied, to the Constitution of the United States.

QUESTIONS PRESENTED

1. Was the Petitioner's firing from her state job founded on her union activity to any cognizable extent in violation of the First Amendment; or was she prevented from showing that it was so founded, in violation of her right to Due Process?

2. If so, this being state action under a state law as enforced by the state, was the firing a violation of Petitioner's rights of Free Speech and Assembly prohibited to the states by the First and Fourteenth Amendments?

3. Alternatively to 2, was the Petitioner denied Due Process by the Commissioner by his *refusal to consider* pertinent, substantial, important proferred evidence on the union activity question?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. A portion of Section 1 of the Fourteenth Amendment to the Constitution of the United States:

> "... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. The Free Speech and Peaceable Assembly Clauses of the First Amendment:

> "Congress shall make no law abridging the freedom of speech. . .; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances."

3. In the Annotated Code of Maryland (Michie, 1957):

Article 64A. "Merit System", Sec. 33:

> "No employee who has completed his probation may be permanently removed from the classified service except for cause . . . (Vol. 5 p. 596)

Article 41. "Administrative Procedure Act", Sec. 255:

> "(a) *Right to review.* Any party aggrieved by a final decision (of any agency) in a contested case, . . .

is entitled to judicial review thereof under this subtitle. ...

(g) . . . The (Baltimore City Court) may affirm the decision of the agency; . . . or it may reverse or modify the decision if the subsubstantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

(1) In violation of constitutional provisions; or . . .

(3) Made upon unlawful procedure; . . .

(5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; . . .

Sec. 256:

An aggrieved party may secure a review of any final judgment of the . . . Baltimore City Court . . . by appeal to the Court of Appeals. . . . (Vol. 4 pp. 185-6)

STATEMENT OF THE CASE

General

Because of union activity, the Petitioner claims, but using for an excuse certain rule infractions, which, for the sake of this record only, are admitted *arguendo*, the Petitioner was fired from her job as a Traffic Court clerk in the Municipal Court of Baltimore City. The Commissioner of Personnel, acting to confirm the validity of the firing under the state Merit System law, refused to allow the presentation by the Petitioner, or to take into consideration substantial quantities of evidence proferred upon the subject of whether her union activity was a motivating factor in the firing.

Because, however, of the Commissioner's repeated *statements,* directly contrary to his *rulings,* the statements being

to the effect that he would not allow anyone to be fired because of union activity, the Court of Appeals of Maryland, treated these statements, apparently, as evidence—possibly as irrebuttable evidence—["(He) made it plain . . . several times that he would not permit Mrs. Melfa to be separated from the service of the State because of her union activity". Opinion of Court Appendix hereto p. 3A] and therefore, the Maryland Court concluded that the refusal to admit *or consider* the evidence of anti-union bias was not an error on the Commissioner's part.

However, the Maryland Court seemed to regard as unimportant or irrelevant, the very real effort of the Petitioner to present such evidence, which effort was firmly rebuffed by the Commissioner, who was later backed up by the Maryland Court which held that he "made it plain" several times that he would "hear any relevant and probative testimony". (App. p. 3A)

The Petitioner will here somewhat belabor the obvious, and will respectfully point out that Petitioner is *not* alleging that the testimony below referred to was in all instances not *given* into the Record (for some of the desired evidence *was* stated *into the record*) but in the case of Mrs. Lanasa, (infra) for example and that of other witnesses which follows, the Commissioner made it perfectly clear *repeatedly,* that *in his thought processes which would follow the giving of testimony,* he would rule *out of consideration,* and *would not take into account* most or all of the evidence proferred as to anti-union bias.

So in effect, this evidence was definitely *not* considered as part of the evidence used in reaching a decision.

This has an advantage however, for ordinarily a Record shows only what was admitted, and what was not. But *this*

Record shows what *weight* was given to the questioned evidence, which was none. That is, the evidence, of union bias as a motivating factor *acting on the employer,* was *either* erroneously kept out of evidence in some instances, or else, if it was in the Record, it was consciously *not included* by the trier of fact in determining whether the firing was motivated by (a) the Petitioner's "mistakes" or insubordination, or (b) *the "boss's" anti-union bias.* The Petitioner most urgently contends that she was fired for the latter and that Free Speech, Free Assembly and Due Process were therefore denied her.

As was stated heretofore, the Maryland Court held that the Commissioner "made it plain" several times that he would "hear any relevant and probative testimony".

So he said, but:

1. He refused *to consider as part of the testimony which he would weigh,* testimony of Mrs. Lanasa, a fellow-employee, that Starkloff, the boss' assistant had expressed anti-union bias.[1] The testimony was *admitted,* but not *considered.*

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[1] From Appellant's Appendix, P. E. 1:

(50) (Mr. Engelman) Certainly. Did you ever have a conversation with the Chief Clerk, Mr. Starkloff, about your membership in the union?

(Mrs. Lanasa) Yes.

(Mr. Sause) Now just a minute. Wait til the Commissioner rules. Mr. Commissioner, I—

(Mr. Davis) Well, you see, I think her testimony ought to be directed toward Mrs. Melfa. *I don't think any other conversation would have any bearing because* after all, she's not on trial.

(Mr. Engelman) No, I know she's not on trial.

(Mr. Davis) I'll certainly concede that she has the right, or any other employee of the State, to belong to any personnel organization.

(Mr. Engelman) Of course she does and that's just the point. Her right to belong to a union was questioned by the Chief Clerk. Mrs. Melfa is a member of the union.

Footnote 1—(Continued)

(Mr. Davis) Well now, Mrs. Melfa can develop that but I don't think that—

(Mr. Engelman) Well, with certain testimony. She can't develop the conversation that Mrs. Lanasa had with Mr. Starkloff, Mr. Davis.

(Mr. Davis) Well, *I don't think that would have any bearing on it* unless—as to what she belongs to or what she don't belong to. What she belongs to—No, Mrs. Melfa is different because Mrs. (51) Melfa is the only one that's on trial here.

(Mr. Engelman) Well, they're both members of the same union. Mrs. Melfa's union membership had something to do with her dismissal, Mr. Davis. That will be brought out (E. 2) by the witnesses. Now, this is one of the witnesses whose testimony will support that.

(Mr. Davis) Well, I'll listen to it. Whether it will become part of the hearing or not I don't know but I'll listen at what she want to say.

(Mr. Engelman) Now, Mrs. Lanasa, you did have a conversation with Mr. Starkloff about your membership in the union, didn't you?

(Mrs. Lanasa) Not exactly a conversation.

Q. Well, there was some talk that transpired between Mr. Starkloff and you. A. Right.

Q. And what was that? A. Well, he just called me in and said that he heard that I had joined the union. I said that's right and he asked me why. I said, "Well, because I've belonged to them before," and that's all.

Q. That's not all. He said something else, didn't he?

(Mr. Sause) Well, now, now, now, now, now, now.

(Mr. Engelman) I hear you, Mr. Sause. Now, don't—

(Mr. Sause) And I'm objecting which I have—

(Mr. Engelman) Objecting? You were hollering, "Now, now, now."

(Mr. Sause) I object.

(Mr. Davis) Let's see.

(Mr. Rothstein) You hollered "now" about seven times.

(Mr. Sause) Did you count them?

(Mr. Rothstein) I counted them, yes.

(52) (Mr. Sause) You want to play it back?

(Mr. Rothstein) Yeah, play it back. Seven times. "Now, now, now."

(Mr. Sause) All right, Mr. Rothstein.

(E. 3) (Mr. Davis) Was there anything else? Did he say anything else?

Footnote 1—(Continued)

(Mrs. Lanasa) No.

(Mr. Davis) He did not.

(Mr. Engelman) Didn't he say words to the effect that "I thought you were my friend?

(Mr. Sause) Mr. Davis, I object to this line of questions.

(Mrs. Lanasa) Yes.

(Mr. Sause) Don't answer that.

(Mr. Engelman) So he did say something else?

(Mr. Sause) Mr. Commissioner, this is going very far afield, sir.

(Mr. Davis) Well, I don't think we ought to bring that into it if you can get—

(Mrs. Lanasa) No, I don't think—

(Mr. Davis) —Mrs. Melfa. I don't think as far as this witness is concerned. I think it's extraneous.

(Mr. Sause) Then I move that it be stricken, sir.

* * * * * *

(E. 4) (Mr. Engelman) At first, you testified, Mrs. Lanasa, that he asked you whether you joined the union and you told him yes and he asked you why, right?

(Mrs. Lanasa) Right.

Q. And you said because you belonged to a union before where you worked, isn't that right? A. That's right.

Q. Where was that? A. The A&P and the Acme.

Q. You belonged to the Retail Clerks? A. That's right.

(Mr. Sause) Mr. Commissioner, objection.

(Mr. Davis) Well, I'll decide whether or not we'll let it stand as part of the record. *I think it's extraneous. I don't think this should have anything to do with this hearing as far as Mrs. Melfa is concerned.*

(Mr. Engelman) And then you started to walk out, is that right?

(Mrs. Lanasa) Yes.

Q. Right, and then what did he say? A. He just said, "I thought we were friends." I said, "We still are."

Q. That right. What was your understanding of what Mr. Starkloff said when he said, "I thought we were still friends."

(Mr. Sause) Just a minute. Objection.

(Mrs. Lanasa) Don't understand what you mean.

(Mr. Sause) Objection.

(Mr. Engelman) What did he mean by that?

(54 (Mrs. Lanasa) I don't know. I just took it—

(Mr. Davis) *Listen, I don't think we ought to go any further with this. This girl's not going to be discharged by me because she*

Footnote 1—(Continued)

is a member of the union. That I want (E. 5) to assure you. *I don't care what the evidence or the testimony—*

(Mr. Engelman) We hope not, Mr. Commissioner.

(Mr. Davis) Well, I can assure you of that.

(Mr. Engelman) Following this meeting with Mr. Starkloff, did you call the attention to Mr. Ciampa of this discussion you just had with Mr. Starkloff?

(Mrs. Lanasa) Yes.

(Mr. Sause) Objection. Now, Mr. Commissioner, I—

(Mr. Davis) I don't think we ought to pursue this any further.

(Mr. Engelman) Mr. Commissioner, you can have my promise that you will see by the end of this case exactly why I'm doing it. Now, why I should not be allowed to develop—

(Mr. Davis) Well, I'm not going to let you pursue it with other witnesses. Now, if you can show any prejudice on the part—that these charges are the result that she belongs to the union *through the people who preferred the charges.* This girl didn't prefer the charges. She had nothing to do with it.

(Mr. Engelman) This girl will give testimony as to what happened when discussions were held in reference to the *union and what happened when she went with her union representative to the Chief Clerk about a grievance.*

(Mr. Davis) *The only thing I'm interested in is* whether or not this girl is a good employee and whether she should be kept in her job or whether she should be removed because she's not a good (55) employee *not because of any association she has.*

(Mr. Engelman) Mr. Commissioner, you know that I think—and maybe I've devoted a lot of time to this case (E. 6) and I have pointed out to you that we have been unable to understand what the basis for the charges were because the girl may have made few mistakes in making postponements is surely not reason to discharge somebody from Merit System employ and from the State service and that—

(Mr. Davis) Well, there are other things, of course, in the charges that may be developed, of course, other than the mistakes that she made.

(Mr. Engelman) *Well, Mrs. Lanasa is here now and Mrs. Lanasa is going to throw light on something which* will be brought up later on. Now that is a fact and that is vital. Now, I think that we would be—

(Mr. Davis) *I don't want to discuss this thing because* this girl—This lady's testimony as to her membership in union doesn't have anything to do with Mrs. Melfa. We know that there are certain department heads that prefer certain organizations over and above

Footnote 1—(Continued)

others. That often comes frequently here and I represent all of them and I certainly have no choice and if it can be developed later but I think that the testimony—*The only testimony I'm interested in is to whether or not Mrs. Melfa is a good employee or whether she's guilty of the charges as made. Of course, that are no charges in here that she's a member of the union or that—*

(Mr. Engelman) No, of course not. They couldn't. That wouldn't be a valid charge.

(Mr. Davis) Well, ought not to be, that's true.

(Mr. Engelman) It shouldnt's be but I—Pardon me. Mrs. Lanasa will (56) not be able to be excused then. She'll have to be recalled because then by that time—

(Mr. Davis) *What is it you want answered? I'm not going to permit this to be a sounding board for the union* (E. 7) *or the Classified Employee or anything else. This lady is not on trial here—*

* * * * * *

(App. 6) (Mr. Engelman) Well now, after this happened between you and Mr. Starkloff, Mrs. Lanasa—

(Mr. Lanasa) Yes.

Q. Did you and Mr. Ciampa have an appointment and see Mr. Starkloff about that? A. That's right.

(Mr. Sause) Mr. Commissioner, I object—

(Mr. Engelman) Didn't Mr. Starkloff—

(Mr. Sause) I object again. May I suggest that if he wants her to testify, he'll have an opportunity to present (App. 7) his case and he can bring this lady back as his witnesss but it certainly is unfair to cross-examine her on things that were not the subject of the direct examination—

(Mr. Davis) I think that's right. I think that's the proper procedure.

(Mr. Sause) —and to inferentially make it a part of my case.

(Mr. Davis) If he wants to bring her back to substantiate some other thing I think that's the proper procedure.

(T. 57) (Mr. Engelman) I only have a few more questions.

(Mr. Sause) I strenuously object. You've been more than liberal and I think that—

(Mr. Davis) Well, I try to be. I don't have any interest in this case. I never saw it until this morning and I didn't even know what the charges were and I have no interest in that. I want Mrs. Melfa to have a fair hearing and—

(Mr. Rothstein) Mr. Russell, if you would permit me, I could very bluntly and very pointedly tell you the reason why my colleague

Footnote 1—(Continued)

would like you to hear the testimony. I'm not talking about the testimony itself but very bluntly it's this.

(Mr. Davis) Shut that off..

(Mr. Sause) I'd like it on there, sir. I'd like it on there if it's going to be a blunt statement. I think it ought to be in the procedure.

(Mr. Davis) All right.

(*Mr. Rothstein*) Very buntly, it's this. That one of the compelling motives that brought about the suspension of Mrs. Melfa was animosity on the part of the—on the part of Mr. Starkloff and Judge Harrington to her joining this union and they were out to get her because—

(Mr. Davis) *Of course you'll have to substantiate that too them.* (App. 8) (Mr. Rothstein) Yes, we're going to do it. They were out to get her because of it.

(Mr. Davis) Then let's not—

(Mr. Rothstein) Isn't that blunt and to the point and that's it?

(Mr. Davis) We can't accept that from you. If this develops—We'll see that it's got to be more than that.

(T. 58) (Mr. Rothstein) Well, you're entitled to know what the motive was for the dismissal. The motive is all important.

(Mr. Engelman) Mr. Davis?

(Mr. Davis) Yes.

(Mr. Engelman) I only have a few more questions for Mrs. Lanasa. I don't think you'll fined the material objectionable *and I think it's appropriate that it be brought out now while she's here.*

(Mr. Sause) On behalf of my client, the Municipal Court, I put her at the disposal of the Commissioner which of course she isn't anything. If they want to bring her back as a witness, sir, she will be back here. She won't leave. Anything you want. Her time is—

(Mr. Davis) *To substantiate any other testimony.* I think thats' proper procedure.

(Mr. Sause) But she should be—

(Mr. Davis) I don't think that—

(Mr. Sause) They're trying to prove their case with my witness.

(Mr. Davis) —this is the time or place for that. She's going to be here. She'll be available to you if you want to bring her back. I don't think this is the time or place for that.

(Mr. Engelman) All right. I don't want her excused. I want her to be around.

2. He refused to admit a conversation which the boss (Harrington) had had with his assistant (Starkloff) just before the Petitioner was fired, which the Petitioner very strongly feels would have shown she was fired because of anti-union bias. The Commissioner was not entitled to exercise protection of a fellow-state-official in such a manner to the detriment of the Petitioner's right to join a union (E. 14).[2]

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[2] From Appellant's Appendix p. E. 14:

(Mr. Engelman) Mr. Ciampa called him about her. They had an appointment to talk about her case and then he went down to Judge Harrington. Now, I want to know what happened.

(Mr. Sause) Well, I don't want anything that's outside— I don't think it ought to be any private conversation that he had with Judge Harrington. I don't think we ought to go into that.

(Mr. Engelman) Well, I think we're going to go into that right now. What happened when you got down to Judge Harrington?

(Mr. Sause) Well, let's let Mr. Davis rule on it.

(Mr. Davis) What is the question?

(Mr. Sause) My objection is, sir, that I think that any private conversation that Mr. Starkloff and Judge Harrington had is not proper subject of inquiry.

(Mr. Engelman) It surely is.

(Mr. Davis) How would you know about such a conversation?

(Mr. Engelman) He just told me he went down to Judge Harrington to talk to him about this matter.

(E. 15) (Mr. Davis) *I don't think he has to disclose his conversation with his boss. I don't think he has to.*

(133) (Mr. Engelman) Why not? I mean under what rule wouldn't that be admissable.

(Mr. Davis) Well, you can take exception to it if you want. I overrule you.

(Mr. Engelman) When you came down to Judge Harrington, what did you discover? You don't have to say what your conversation was. What did you learn?

(Mr. Starkloff) What do you mean, learn?

(Mr. Engelman) What did you learn when you came down to Judge Harrington?

(Mr. Sause) You mean what did he say, sir? I'm sorry. I don't understand the question.

(Mr. Engelman) I don't care if you understand it. I want Mr. Starkloff—

Footnote 2—(Continued)

(Mr. Sause) Well, I do care, sir, because I am here as an attorney and I'm can't do my job if I don't understand it, sir.

(Mr. Engelman) I can hear you without you raising your voice, Mr. Sause: I told you that in the beginning of this proceeding.

(Mr. Sause) Now, Mr. Davis, again I don't understand the question and I would like you to, if you would, Mr. Commissioner, clarify the question for me so that I can make a proper decision as to whether to object.

(Mr. Davis) Well, I don't know. *Of course, the implication here is that this girl was discharged because she was a member of the union and there's been no such testimony that can substantiate such a charge* and perhaps they're going to put on somebody else. I don't know.

(Mr. Engelman) Mr. Davis, I don't think they're going to come (134) right out and admit it.

(E. 16) (Mr. Davis) Well, we can't go on suspicion of things of that sort.

(Mr. Sause) I simply don't understand, sir, and I don't think the witness does either, what they mean by what did he learn when he got down to Judge—If it's what did he see, I'm perfectly happy for him to relate that but what did he learn, I don't know.

(Mr. Engelman) Did you learn that on July 17th, 1964, at 10:00 A.M., that Judge Harrington had fired her?

(Mr. Starkloff) When I got down there that had not taken place yet, sir.

Q. All right. When did it—How long after you got down there did it take place? A. Probably a half or three-quarters of an hour.

Q. After three-quarters of an hour it took place and during that time, did you discuss Mrs. Melfa? A. Did I discuss—

Q. With Judge Harrington, Mrs. Melfa? A. No, sir.

Q. *Well, what did you discuss with him?* A. Now, you're asking me the same question in another way now, sir.

(Mr. Davis) It's perfectly normal that this man—the position he holds—discussed whether or not this girl was going to be suspended *but I don't think he has to disclose in his testimony to us as to what they said.* He evidently agreed to—Judge Harrington—or at least they agreed together to take this step which was to suspend and prefer charges.

* * * * * *

(App. 24) (T. 134) (Mr. Engelman) As a result of going down to see Judge Harrington (T. 135) at about quarter after 9:00, or 9:30 perhaps, did you agree with Judge Harrington that she should be suspended pending charges?

(Mr. Starkloff) Yes, sir.

3. Evidence that another employee, the president of the same union was fired the same day, was stated by the Commissioner to have "nothing to do with this hearing", coupled with the statement that the charge (the only charge?) she could answer to was inefficiency "not the union". (E. 19.)[3]

Footnote 2—(Continued)

Q. When agreeing to that, did you make known to Judge Harrington that you had just talked to her union representative and had made an appointment for him to be there at 10:00 o'clock? A. I told him that I had talked to the gentleman but I did not know why he was coming up because I was never told over the phone what his mission was.

Q. Well, he said it was a grievance, didn't he? A. That's all he said.

Q. Right. A. He did not tell me why.

Q. Well, that's why he wanted to talk to you so— A. Well, I don't know why he was coming over, sir.

(Mr. Sause) Mr. Davis, I'd like you to know, for the record, that I'm not objecting to this although this is the same wolf in other clothing because I don't think that they ought to be convinced that something nefarious didn't go on there and I'd rather that their minds be put at ease than to persist in what I think is a very valid objection so I have—if they want to ask him about what happened there, I'm sure Mr. Starkloff can answer it to satisfy them.

(Mr. Davis) Well it's very obvious. He has said he agreed with Judge Harrington that this person ought to be suspended and charges preferred and that's the usual procedure between people who are head of a department.

(Mr. Engelman) Did you recommend to Judge Harrington that charges (T. 136) be preferred and that she be suspended?

(Mr. Starkloff) Did I recommend?

Q. Yes. A. No, sir.

* * * * * *

(App. 25) Q. You just went down to tell him that Mr. Ciampa was coming over at 10:00 o'clock. A. That's correct, sir.

Q. And he decided to prefer the charges, is that right? A. Yes, sir.

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[3] From Appellant's Appendix, p. E. 15:

(137) Q. So then Mr. Ciampa walked in and he didn't know about this, did he? What happened when Mr. Ciampa walked in a few minutes later? A. Ciampa walked in—

Footnote 3—(Continued)

Q. Mrs. Melfa was out on the street, wasn't she? She was told not to come back in the building and he was supposed to have a grievance with her. A. I don't know where she was but I think this and another gentleman got in to the Chief Judge that particular morning. They did get in.

* * * * * *

(139) (Mr. Engelman) Mr. Starkloff, another Municipal Court employee was fired on the same day, wasn't he? A. That's correct, sir.

(Mr. Sause) Was suspended. Let's use the words of the law.

(Mr. Engelman) No. I'm not going to use the words of the law deliberately because I don't agree that it was done in the right way.

(Mr. Sause) Mr. Commissioner, I think that he should not answer the question.

(140) (E. 18) (Mr. Davis) *I don't think it makes any difference.*

* * * * * *

(Mr. Starkloff) Another employee was suspended on that day.

(Mr. Engelman) That true, isn't it? A. Yes, sir.

Q. And received an identical letter of the type Mrs. Melfa received and we noted the time as being 10:00 A.M., is that right? A. But he refused to accept the letter.

Q. I didn't ask you whether he accepted it or not. A. Well, he didn't receive it.

Q. It was issued, wasn't it? A. It was issued. He did not receive it.

(Mr. Sause) I object to that.

(Mr. Davis) That's not pertinent to your case.

(Mr. Engelman) Now, that person was the president of the local union down there, isn't that right?

(Mr. Sause) Well now, I object to that.

(Mr. Starkloff) I don't know about that.

(Mr. Engelman) You don't know that? A. No, sir.

Q. Do you know whether he was a member of the union or not?

(Mr. Sause) I object to that. Let's not let that cat out of the bag today. That's tomorrow or another day.

(Mr. Engelman) You try your case, Mr. Sause, and I'll try mine.

(Mr. Sause) Well now, I have a right to object, Mr. Engelman, and I must make them as articulately as I know how.

(141) (Mr. Engelman) Now, Mr. Starkloff, were you aware of the fact that Mr. Lucke was a member of the union?

(E. 19) (Mr. Sause) I object.

(Mr. Davis) *That has nothing to do with this hearing, Mr. Engelman.* I don't like this to be dragged in here. There's been no

Footnote 3—(Continued)

testimony from anybody here that ties this thing in as a direct act because this lady was a member of the union. It's just mere suspicion and you're trying to hang this on these people. There's been no testimony. This man's under oath.

(Mr. Engelman) This man's under oath and I don't expect—

(Mr. Davis) And you don't believe him.

(Mr. Engelman) No, otherwise he'd admit that the reason that they were firing her—He's not going to come out and say because she was a member of the union but it seems to me—

(Mr. Starkloff) Because it's untrue.

(Mr. Davis) Well, you can't expect me to accept suspicion.

(Mr. Engelman) Not suspicion. The fact of the matter it that this girl is being charged with inefficiency from April 16th—

(Mr. Davis) *That's the charge you've got to answer to, not the union.*

(Mr. Engelman) *—which is when she joined the union and the other employee that was suspended was the president of the union and they were suspended at the same time that a hearing had been scheduled with Mr. Ciampa, the International Representative of the union.* Now, the hearing wouldn't be complete without this background information in there, Mr. Davis, otherwise we'd be getting part of the story and not the whole story.

(Mr. Davis) *Well, there's no direct testimony here*—Mr. Starkloff (142) is under oath—*that any of these proceedings were taken as a result of this lady being a member of the union.* There are other members of the union in your agency, aren't there? In your agency, are these the only two members in the agency?

(Mr. Starkloff) I think they have a few other members. I couldn't name them all.

(Mr. Davis) Well, that's no basis, of course, to charge any person. They have a right to join any organization they want.

(Mr. Engelman) Amen.

(Mr. Davis) You hear me say that many times.

(Mr. Engelman) I know that, Mr. Davis.

(Mr. Davis) That's right.

(Mr. Engelman) And I know you respect the employees' right in that regard.

(Mr. Davis) Yes sir, we do.

(Mr. Engelman) —but I can't—I just feel it would be like a lawyer trying half a case if it wasn't permitted for this material to be brought out.

(Mr. Davis) I think that you think that.

4. The Commissioner apparently (and almost certainly, according to the Record), excluded from his consideration detailed and extensive anti-union-bias testimony of a union representative, including evidence of the use by the Petitioner of a labor grievance procedure against the boss. (E. 20)[4]

Footnote 3—(Continued)

(Mr. Engelman) Well, I do. I have no further questions. Thank you. (Machine turned off to reverse tape. In the process, the beginning of Mr. Engelman's next statement was not recorded.)

There's no basis that—

(Mr. Davis) That's only one of the charges, 47-C.

(Mr. Engelman) 47-C. That should be out.

(Mr. Davis) That's right.

(Mr. Engelman) Now, there are also—

(Mr. Sause) May I make a comment as to that, sir, so we take them (T. 143) one at a time?

(Mr. Davis) All right.

(Mr. Sause) That was put in as much perhaps to provide as mellow a basis for Mrs. Melfa's discharge as we hope you will find as possible. It occurred to us—

(Mr. Davis) You mean because she has taken excessive sick leave?

(Mr. Sause) Well, this is not in a reprehensible sense, sir, but we think that her work record of 19½ days absent during the first seven months of this year indicates that perhaps the woman's—

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[4] (E. 20) (153):

(Mr. Ciampa) No, no. If I may, sir, I think I can lay some light to the context of activities here. Then in your good judgment, you'll decide whether—

(Mr. Davis) Well, I'm not interested in that. I'm not interested in the activities of any organization of state employees. None at all.

(Mr. Ciampa) Well the point I'm trying to make, sir, is that Mrs. Melfa had a grievance that I never got to present and I'd like to state the circumstances around which I was unable to present them.

(Mr. Sause) I have no objection to that but not stating the grievance unless it was brought to the attention of the court. That's all. Circumstances, O.K.

* * * * * *

(E. 21) (154)

(Mr. Ciampa) Well, I realize that but how do we get something like this into a quasi-judicial session and still be able to come out and

Footnote 4—(Continued)

say that the Commissioner has all the facts when there things have transpired between the union, the counsel for the State, counsel for the employee as to what goes first and you remember, sir, two people were fired the same day, considered under the same pot of beans, but two weeks later there were two entirely separate charges filed. Then the State insists that we will not go forth with the Lucke case until we hear the Melfa case. Now, second, there is some background information and a background reason—

(Mr. Davis) Well now, listen. If that's all you've got to talk about, I don't want to hear it. I do not want to hear that.

(Mr. Engelman) He's testifying about the matter which he scheduled—

(Mr. Davis) It's got nothing to do with these charges. I've never see them until today on Mrs. Melfa. I have never seen the charges on Mr. Lucke. I have never seen them. I don't even know what they are or what they contain and I have never, in all these years, looked at any of the charges until the day of the hearing. It's based entirely upon suspicion. *There is not one word of evidence. Not one iota of evidence in this thing. It's been categorically denied that it's because of any union membership and just because you people think so—*

(155) (Mr. Engelman) *Well, you haven't given us a chance to say why.*

(Mr. Davis) Well now, I wouldn't expect him to think any other way other than the same way I would expect Mr. Starkloff to say the opposite.

(Mr. Engelman) Will you let him say it now? Let Mr. Ciampa say what happened on July 17th.

(Mr. Davis) What was the day of suspension?

(Mr. Sause) July 17th.

(Mr. Engelman) 17th. It couldn't be any more relevant, Mr. Davis, than what happened on July 17th. This man's involved in it. He was there.

(Mr. Ciampa) On July 17th at 9:30, I called Mr. Starkloff and asked him for a meeting concerning the problems in Traffic Court concerning the grievance of some other employees.

(Mr. Davis) Why did you call him? Had Mrs. Melfa contacted you?

(Mr. Ciampa) Yes.

(Mr. Davis) Then she knew she was in trouble. She knew she was going to be suspended.

(Mr. Engelman) No, no.

(Mr. Ciampa) No, sir. No, sir.

(Mr. Engelman) Tell him why. About the union membership that Mr. Klein said.

How the Federal Questions Were Raised and Decided (Supreme Court Rule 23(f))

Apparently the Maryland Court of Appeals felt that the constitutional questions had been appropriately raised

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Footnote 4—(Continued)

(Mr. Ciampa) That's right. He had from Mrs. Melfa a statement which reads—

(Mr. Sause) No, no, no, no, no, no, no, no, we're not going to get any statements from Mrs. Melfa in unless Mrs. Melfa wants to be sworn and subject herself to cross-examination.

* * * * * *

(158) (Mr. Davis) I don't know. I've never seen the charges.

(Mr. Ciampa) I asked him, "Well, how—" and he started talking about anonymous letters. The Chief Judge was quite unset at the time. He started talking about anonymous letters and unsigned letters and blackmailing the court and I asked the Judge at that point would this not be something of a criminal nature rather than a personal employee matter. He said, "Well, I've been a Federal prosecutor for quite a few years. I know how to present my case and I may take him to criminal court eventually also." I asked him why Melfa was in the same package and he said, "Well, I have a woman here that's going through the change and I think she's going a little kooky," and that was the extent of his explanation of reason for discharging Mrs. Melfa. I told him at that point would he consider a transfer.

(Mr. Davis) Mr. Ciampa, the *only* thing that Mrs. Melfa can be discharged on is the basis of the *testimony in this case relative to her efficiency* not whether she's a member of the union.

(Mr. Engelman) All right. Thats all O.K. I have no further questions.

(T. 160) (Mr. Engelman) No, they're not witnesses. Mr. Ciampa, can you tell the Commissioner approximately how many members of your union are represented down at the Municipal Court of Baltimore City?

(Mr. Ciampa) About 12.

Q. *Now, on July 17th, 1964 Mr. Joseph Lucke,* who I understand is president of the union, *and Mrs. Melfa,* who I understand is a member of the union, *were suspended from their jobs. Have there been any new union memberships in your union since July 17th, 1964? A. No, sir.*

(Mr. Engelman) I have no other questions that I want to ask Mr. Ciampa at this time.

below, for at p. 2A lines 8 and 9 (Appendix hereto) of that Court's Opinion, it was stated that "Judge Cullen (found) . . . that the action of the Commissioner was not unconstitutional. . . ."

The federal questions were clearly raised in the Petitioner's Brief in the Maryland Court of Appeals, as part of the Argument upon Questions 1 and 2. At pp. 9-10 of her Brief below, she stated:

> "Violation of Rights of Free Speech and Assembly
>
> "Furthermore, to refuse to hear any evidence whatever on union activity as a contributing factor in the firing—to simply and absolutely take the position which Davis took, that it couldn't happen, and therefore it didn't happen—is to make union activity completely indefensible. Any employee joining a union is thus subjecting his job to great peril. His right to Free Speech is endangered, his right to Freedom of Assembly is endangered, he is deprived of Liberty and Property without Due Process of Law, all in violation of the First, Fifth and Fourteenth Amendments and in violation of the Maryland Declaration of Rights.
>
> "Commissioner Davis' refusal to hear evidence on the union matter was itself a denial of Due Process.
>
> "Likewise, his constant expressions of deference, of sympathy, of consideration for the feelings and reputation of the Chief Clerk and of the Chief Judge of the Municipal Court at the expense of the rights of the Appellant, were such as to display a bias, particularly in favor of the Chief Judge, amounting to a deprivation of Due Process.
>
> "The matter should be tried over again before an unbiased nisi prius tribunal.

"In justice, until that time, the Appellant should be reinstated at full pay."

This portion of the Argument in the Brief to the Court of Appeals had, in turn been based upon this question presented as "No. 1" among the "Questions Presented" in the Brief below:

"1. Did the Court below err in upholding the Commissioner of Personnel in ruling *out of consideration* the Appellant's superiors' hostility, both expressed and implied, toward union activity, and *in excluding from evidence much, or all, of the background facts* showing that union activity was a major cause of the employee's discharge. In addition to being a substantial and prejudicial ruling on a matter of evidence, was not this ruling also a violation of the Appellant's rights to Free Speech and Freedom of Assembly under the First Amendment to the federal Constitution?" (Emph. supp.)

The Maryland Court passed upon these matters by holding as follows (Appendix hereto pp. 1A-2A):

"(The Petitioner) argues that this action was legally unjustified because the Commissioner refused to receive testimony she offered to show that the Chief Clerk and the Chief Judge of the Municipal Court suspended her and preferred charges against her *because of their bias against unions* and their animosity against her for having joined one, although she admits that absent these claimed improper motivations, the Commissioner reasonably and fairly could have found her to have been inefficient and incompetent in her work and insolent and insubordinate to her superiors." (Emph. supp.)

(Petitioner *denies emphatically* the correctness of this characterization of her position before the Maryland Court. At oral argument what was clearly intended was to state that there was such evidence in the Record from

which such administrative findings could conceivably have been made, but that without considering them in conjunction with the union-bias evidence, no correct conclusion could possibly have been reached.)

The Court went on:

> "Judge Cullen . . . affirmed, finding that the claim of rejection of testimony was without merit and that the action of the Commissioner was not unconstitutional. . . . We agree. The contentions of the Appellant are frivolous in light of the facts."

ARGUMENT

Oppression of citizens by a State, acting in its official capacity can take several forms.

All of such forms, it is to be hoped, are unconstitutional. Prohibition of free speech by a State is certainly unconstitutional.[5]

And this is so regardless of the fact that the prohibition arises out of a law guaranteeing employment stability which the state need not have passed, and regardless of the fact that without such a law the state is probably free to hire and fire at will. Having passed such a law, however, the state has chosen to act, and it cannot act unconstitutionally.

A growing problem in our rapidly growing society, with proliferating necessary or desired social services, and likewise proliferating administrative bodies, is to keep those bodies clean and sanitary—and to prevent their use for purposes of oppression.

Therefore this case transcends its immediate importance to Mrs. Melfa, but becomes of interest everywhere,

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[5] Herndon v. Lowry 301 U. S. 242 (1937); Cantwell v. Connecticut 310 U. S. 296 (1940).

to every citizen who has had precious rights placed willy-nilly for administration in the calloused hands of cynical unbelievers in Due Process rights.

Here, the Maryland Legislature solemnly passed a law prohibiting the state from firing its employees other than for cause.[6]

Undoubtedly Maryland did not have to pass such a law, but having passed such a law, Maryland *must* enforce it equitably—or more than equitably; *constitutionally*. It can neither pass an unconstitutional statute, nor enforce a statute in an unconstitutional manner.[7]

> "Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." *Yick Wo v. Hopkins,* 118 U.S. 356, 373, 37 (1886).

This is to say, in effect, that the law cannot be interpreted to mean—in saying that an employee can only be fired "for cause"—that "cause" can consist of the exercise of free speech, or that the law restrains the state from firing but for cause *everyone but union members.*

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[6] Art. 64A Sec. 33 Annotated Code of Maryland (Michie 1957) "No employee who has completed his probation may be permanently removed from the classified service except for cause, upon written charges...."

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[7] Abington School District v. Schempp 37 U. S. 203 (1963). Under the Equal Protection Clause it must enforce it the same for all; both for union members and for union non-members. See also Truax v. Corrigan 257 U. S. 312 (1921), Neal v. Delaware 103 U. S. 370 (1881), Missouri ex. rel. Gaines v. Canada 305 U. S. 337, 343 (1938).

Moreover the exercise of Free Speech itself embraces the advocacy of unions and union membership.[8]

As is usual in such a situation, the agency involved denies that the reason for its action is the reason attributed by the Petitioner. Yet the fundamental error in the case seems clear. And dangerous. It was the Personnel Commissioner's failure to consider the proferred evidence tendered by the Petitioner which was intended to give the lie to the agency's protestation that the firing was not for union activity. Time after time the Commissioner indicated that such evidence would not be received, *or if received, would not be considered.*[9]

(The Respondent below continually made much of the fact that a modicum of this evidence was perhaps actually allowed in. Respondent carefully ignored the fact however that even if allowed in, *it was not considered.* Footnote 9.)

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[8] Marsh v. Alabama 326 U. S. 501 (1946); Thornhill v. Alabama 310 U. S. 88 (1940); Carlson v. California 310 U. S. 106 (1940).

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[9] The following are some of the commissioner's repeated rulings or comments on the union activity evidence (some have already been cited in footnotes 1 to 4 and are repeated here):

As to the assistant-boss Starkloff's anti-union hostility expressed to one Mrs. Lanasa.

"I don't think that would have any bearing on it . . .". (E. 1 (50)).

And (E. 2 (51)). "Well, I'll listen to it. Whether it will become part of the hearing or not I don't know. . . . (E. 3 (52)). Well, I don't think we ought to bring that into it if you can get—Mrs. Melfa. I don't think as far as this witness is concerned, I think it's extraneous."

(E. 4-5 (53,54)). Q. And you said because you belonged to a union before where you worked, isn't that right? A. That's right. . . .

Q. Right, and then what did he say? A. He just said, "I thought we were friends." I said, "We still are." . . .

A Federal Question of Substance Not Heretofore Determined

Thus, once again, this Court is being petitioned to place bounds on the unbridled exercise of State power through

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Footnote 9—(Continued)

(Mr. Engelman) Following this meeting with Mr. Starkloff, did you call the attention to Mr. Ciampa of this discussion you just had with Mr. Starkloff?

(Mrs. Lanasa) Yes.

(Mr. Sause) Objection. Now, Mr. Commissioner, I—

(Mr. Davis) I don't think we ought to pursue this any further.

(Mr. Engelman) Mr. Commissioner, you can have my promise you will see by the end of this case exactly why I'm doing it. Now, why I should not be allowed to develop—

(Mr. Davis) Well, I'm not going to let you pursue it with other witnesses. Now, if you can show any prejudice on the part—that these charges are the result that she belongs to the union through the people who preferred the charges. This girl didn't prefer the charges. She had nothing to do with it.

(Mr. Engelman) This girl will give testimony as to what happened when discussions were held in reference to the union and what happened when she went with her union representative to the Chief Clerk about a grievance.

(Mr. Davis) The only thing I'm interested in is whether or not this girl is a good employee and whether she should be kept in her job or whether she should be removed because she's not a good (55) employee not because of any association she has.

. . . (E. 4 (53)) I think it's extraneous. I don't think this should have anything to do with this hearing as far as Mrs. Melfa (the Petitioner) is concerned."

. . . (E. 4 (54)) This girl's not going to be discharged by me because she's a member of the union. That I want to assure you. *I don't care what the evidence or testimony.*" (sic) (Emph. supp.)

(E. 6 (55)) . . . This lady's testimony as to her membership on the union doesn't have anything to do with Mrs. Melfa.

. . . The only testimony I'm interested in is . . . whether she should be removed because she's not a good employee not because of any association she has.

And,

(E. 6 (56)) What is it you want answered? I'm not going to permit this to be a sounding board for the union. . . .

And, (E. 14 (132)):

(Mr. Sause) My objection is, sir, that I think that any private conversation that Mr. Starkloff and Judge Harrington (the assistant boss and the boss) had is not proper subject of inquiry.

the expedient of placing the onus or responsibility for such action on an administrative agency, and then

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Footnote 9—(Continued)

(Mr. Davis (the Commissioner)) I don't think he has to disclose his conversation with his boss. I don't think he has to.

. . . Why not?

. . . (Commissioner) Well, you can take exception to it if you want. I overrule you.

Then (E. 6 (134)) the witness, the assistant boss, denied discussing the Petitioner with the boss, but whether or not they discussed the union—this was ruled out (E. 16) :

. . . I don't think he has to disclose in his testimony to us as to what they said. . . .

Nor in any subsequent exchange was any free inquiry had on the question of whether union activity was discussed.

A Mr. Ciampa, a representative of the International Union in question, was also offered, as Petitioner's witness, to a matter concerning the employer's anti-union hostility and its expression, by the employer, by the firing of Mrs. Melfa and another union member on the same day:

At. E. 20 (153) the Commissioner says:

I'm not interested in the activities of any organization of state employees. None at all.

(Mr. Ciampa) Well . . . Mrs. Melfa had a grievance that I never got to present and I'd like to state the circumstances around what I was unable to present them.

(Mr. Sause) I have no objection to that but not stating the grievance unless it was brought to the attention of the Court. That's all. Circumstances, O.K.

Ciampa then relates that *two union people* were fired the same day (see footnote 4 infra.), and "second, there is some background information and a background reason"—but the Commissioner—

". . . now, listen. If that's all you've got to talk about, I don't want to hear it. . . ."

". . . There's not one iota of evidence in this thing. It's been categorically denied that it's because of any union membership and just because you people think so—."

"Everybody talkin' 'bout Heav'n ain't goin' there" says a popular spiritual. Can the Commissioners' protestations that he would not permit the Petitioner to be fired from the service of the State because of her union activity, be considered as *evidence* by the Maryland Court of Appeals that she was *not* fired for union activity? No cases are known to the Petitioner in which comments of the trier of fact have been elsewhere treated as substantive evidence on which to base

going through elaborate motions of "granting" a "judicial" review, but yet being at all times governed by the administrative law principles which place an entirely insuperable burden on the Petitioner. Such rules as affirming if there is "any substantial" evidence from which the agency "could have" found as it did, or the well known rule requiring the Petitioner to show arbitrariness, or capriciousness.

Thus the State caparisons a tyrant to act for it, and to stifle free speech in the name of efficiency or "for the good of the civil service."

But the State of Maryland has not successfully closed all the doors! It has neglected the fact that this Court in *Willner v. Committee on Character* 373 U.S. 92, 102, quoting *Schware v. Board of Bar Examiners* 353 U.S. 232, 238, has held "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clauses of the Fourteenth Amendment." The State of Maryland has neglected the fact that this Court has in the past protected Free Speech in other situations.

The question, however, has not, it is believed, been determined by this Court, as to whether State authority can be used to suppress Free Speech by denying a person a livelihood through the action of a State agency, which carefully preserves many of the *appearances* of Due Process at the same time that it denies the Petitioner

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Footnote 9—(Continued)
a finding. The per Curiam Opinion treats the protestations as such evidence, and in the opinion of this reader, as *irrefutable* evidence, and also gives credence to the Commissioner's statement that he would hear any "relevant and probative testimony that showed or indicated" that she had been fired for such reasons, so that the Maryland Court therefore ignored plain evidence in the Record that this had not been done.

its substance. But this Court has said, "In every case . . . where legislative abridgment of the rights (of freedom of speech and of the press) is asserted the courts should be astute to examine the effect of the challenged legislation." *Schneider v. State of New Jersey,* 308 U.S. 148, 161. (A handbill and picketing case decided in 1939.)

No case is known, closer in facts and circumstances, than those cited. Yet the Petitioner respectfully suggests that the administrative process has become and is becoming Frankenstein if not Leviathan, and she respectfully prays that this little case be accepted by the Court, that a discourse may be had on the proper containment of agencies.

CONCLUSION

Wherefore it is respectfully urged that the Petition for Writ of Certiorari to the Court of Appeals of Maryland be granted.

Leonard J. Kerpelman
500 Equitable Building
Baltimore 2, Maryland
Attorney for Petitioner

MANDATE OF THE COURT OF APPEALS OF MARYLAND

No. 102, September Term, 1965

Appeal from the Baltimore City Court.

Filed: May 3, 1965.

January 7, 1966: Order affirmed, with costs. Per Curiam filed.

STATE OF MARYLAND, Set:

I do hereby certify that the foregoing is truly taken from the record and proceedings of the said Court of Appeals.

In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Appeals, this seventh day of February A. D. 1966.

J. Lloyd Young,
Clerk of the Court of
Appeals of Maryland.

OPINION OF THE MARYLAND COURT OF APPEALS

Per Curiam:

This appeal arises under the Administrative Procedure Act, Code (1957), Art. 41, §§ 244-56. The appellant, Mrs. Melfa, a clerk in the traffic division of the Municipal Court of Baltimore City who was dismissed from her position in the classified service of the State by the Commissioner of Personnel after a hearing, argues that this action was legally unjustified because the Commissioner refused to receive testimony she offered to show that the Chief Clerk and the Chief Judge of the Municipal Court suspended her and preferred charges against her because of their bias against unions and their animosity against her for having joined one, although she admits that absent these claimed improper motivations, the Commissioner reasonably and

fairly could have found her to have been inefficient and incompetent in her work and insolent and insubordinate to her superiors.

Judge Cullen, hearing Mrs. Melfa's appeal under § 255 of Art. 41 of the Code (1957), and applying the tests and standards set out in subsection (g) thereof, affirmed, finding that the claim of rejection of testimony was without merit and that the action of the Commissioner was not unconstitutional, illegal, arbitrary, capricious or erroneous and that it reasonably could have been based upon a fair consideration of the entire record before him. We agree. The contentions of the appellant are frivolous in light of the facts.

The Merit System Law provides in Code (1964 Replacement Vol.), Art. 64A, § 33, that an employee may be removed from the classified service "* * * for cause, upon written charges and after an opportunity to be heard in his own defense," and that "the Commissioner shall, by rule, prescribe what [other than religion or political opinion or affiliation] may constitute cause for removal * * *." Rule 47 of the Commissioner permits permanent removal from the classified service if "* * * the employee is incompetent or inefficient in the performance of his duty" (paragraph A), and if the employee has " * * * failed to obey any lawful or reasonable direction given by his superior officer when such * * * failure to obey amounts to insubordination or serious breach of discipline * * *." (paragraph D). After the Chief Clerk and the Chief Judge had suffered Mrs. Melfa's incompetence and insubordination for some time in the hope that her work and her attitude would improve, her immediate clerical supervisor again complained and in effect insisted on corrective action. The Chief Judge, his patience then exhausted, suspended Mrs. Melfa without pay

and promptly filed written charges against her with the Commissioner. At the hearing four witnesses, the Chief Clerk, Mrs. Melfa's immediate clerical supervisor, an alternate supervisor, and a fellow employee testified to her extraordinarily small output of work and the constant errors, serious in consequences, she made in the work she did, as well as to her studied attempts to get other employees to slow down in their work. There was also probative testimony as to both petty and gross insubordination on her part.

At the hearing before the Commissioner Mrs. Melfa's counsel—who did not represent her on this appeal—made it clear early in the proceedings that they desired to show as their main defense that one of the "compelling motives" for Mrs. Melfa's suspension was "animosity" on the part of the Chief Clerk and the Chief Judge to her having joined a union for which they were "out to get her." The Commissioner's answer to this was: "Of course you'll have to substantiate that too then." The Commissioner made it plain to the parties and their lawyers several times that he would not permit Mrs. Melfa to be separated from the service of the State because of her union activity or union membership and that he would hear any relevant and probative testimony that showed or indicated that she had been suspended for this reason. No such testimony was offered.

The Commissioner did refuse to permit cross-examination of one witness by Mrs. Melfa's counsel on matters that had not been gone into on direct, since the witness was available to Mrs. Melfa to call as her own (she did not do so) and refused to admit testimony he thought extraneous or irrelevant—with reason we think—and refused to admit hearsay testimony when counsel for the Municipal Court offered to have at the hearing within half an hour, ready

for examination by Mrs. Melfa's lawyers, the declarant sought to be quoted. (This offer was not accepted.) The Administrative Procedure Act states in § 252 (a) of Art. 41 that agencies may admit and give probative effect to evidence which possesses that probative value "* * * commonly accepted by reasonable and prudent men in the conduct of their affairs," and adds that they may exclude incompetent, irrelevant, immaterial and unduly repetitious evidence." We think the Commissioner's rulings were in accord with the letter and spirit of the Act and did not affront any right of the appellant.

ORDER AFFIRMED, WITH COSTS.

OPINION OF THE LOWER COURT

MEMORANDUM

CULLEN, *Judge:*

This case comes before the Court on an appeal from the decision of the Commissioner of Personnel. It is based on section 255 (g) of the Administrative Procedure Act, as found in Article 41 of the *Annotated Code of Maryland.* In substance, section 255 (g) subsection 1-8 states that this Court may reverse or modify the decision of the agency if substantial rights of the Appellant have been prejudiced because the administrative was

1. In violation of constitutional provisions.
2. In excess of statutory authority or jurisdiction.
3. Made upon unlawful procedure.
4. Affected by error of law.
5. Unsupported by competent, material and substantial evidence.
6. Against the weight of such material, substantial evidence.

7. Unsupported by the entire record, including de novo evidence.

8. Arbitrary and capricious.

In contesting the Commissioner's findings, the Appellant relies on the closely related subsection 5, 6, 7 and 8.

The scope of judicial review in this area has been clearly defined in Maryland. Its most recent pronouncement is found in the case of *Board v. Levitt & Sons,* 235 Md. 151, 159-60, when the Court of Appeals stated:

> "Whether the test of substantial evidence on the entire record or the test of against the weight of all the evidence is followed, the courts have exercised restraint so as not to substitute their judgments for that of the agency and not to choose between equally permissible inferences or make independent determinations of fact, because to do so would be exercising a nonjudicial role. Rather, they have attempted to decide whether a reasoning mind could reasonably have reached the result the agency reached upon a fair consideration of the fact picture painted by the entire record.
>
> "In the cases dealing with consideration of the weight of the evidence, the matter seems to have come down to whether, all that was before the agency considered, its action was clearly erroneous or, to use the phrase which has become standard in Maryland zoning cases, not fairly debatable. 73 C.J.S. *Public Administrative Bodies and Procedure.* Sec. 225."

Applying the above test to the facts as set forth in the record and the de novo evidence produced at this hearing, this Court feels the Commissioner's findings that the Appellant was incompetent and inefficient, and that the Appellant was insolent and insubordinate to her superiors was not clearly erroneous and could reasonably have been reached upon a fair consideration of the entire record.

The Appellant further contends that the Commissioner committed errors of law (subsection 4) by permitting the introduction of certain evidence on behalf of the Municipal Court, while refusing to admit certain evidence of the Appellant. Section 252a of the *Administrative Procedure Act* provides that:

> "In contested cases:
>
> "a" Agencies may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonable and prudent men in the conduct of their affairs. They shall give effect to the rules of privilege recognized by law. They may exclude incompetent, irrelevant, immaterial and unduly repetitious evidence."

In construing this statute and other similar statutes such as the Workmen's Compensation Law, the Court has set forth the general rule that evidence in agency hearings may be admitted if it is of "substantial probative value". *Spence v. Steel Co.*, 173 Md. 539. It is also clear that the Commissioner, as a practical matter, "cannot be expected to adhere closely to the rather complex rules developed for jury trials in judicial proceedings . . ." *Standard Oil Co. v. Mealey*, 147 Md. 249. The purpose of such a ruling is to allow the Commissioner freedom of action and it places questions regarding evidence within his sound discretion. Although this discretion cannot be exercised to an unreasonable extent, it should not be disturbed if the evidence accepted meets or the evidence rejected fails to meet, the substantial probative value criteria.

After reviewing the record this Court does not feel that the Commissioner abused his discretion. Testimony of the Municipal Court admitted over the objector of the Appellant related to her sick leave record for the year 1962. Such testimony was relevant, for comparative purposes, to sustain the charges under Merit System Rule 47c. Even if the Court assumes for the sake of argument that the Commissioner did err by admitting this testimony, said error was cured when the Commissioner dismissed the charge

relating to Appellant's illness at the close of the Municipal Court's case.

The proffered testimony of the Appellant which the Commissioner refused to admit concerned the Appellant's statement as to what was told to her by a third party, as to a conversation which the third party had with a fourth party. Although hearsay testimony may be admitted in administrative hearings under some circumstances the Court does not feel that this was such an instance. The testimony as contained in the proffer was seemingly contradictory to that of another witness and the Commissioner specifically stated that he felt the declarant "ought to be here for cross examination." The Municipal Court offered to have the declaration in Court "within a half hour." This offer was rejected by the Appellant. Under these circumstances the Court does not feel that the Commissioner abused his discretion by refusing to admit the testimony.

The Appellant's final contention, raised for the first time at the hearing before this Court, is that her counsel who represented her before the Commissioner was incompetent. Although inadequacy of counsel as such does not appear as one of the basis for review under the Administrative Procedure Act, the Court feels it could fall within the purview of Section 255g, subsection 1, as a violation of one's constitutional rights. However, after reviewing the record as a whole and considering the de novo testimony of the Appellant, this Court finds no evidence to justify a finding that counsel was incompetent.

For the reasons set forth above, this Court has determined that the decision of the Commissioner of Personnel should be affirmed.

/s/ James K. Cullen

OPINION OF THE ADMINISTRATIVE AGENCY
ORDER OF THE COMMISSIONER

October 8, 1964

Charges were filed by the Chief Judge and the Chief Clerk of the Municipal Court of Baltimore City against

the Respondent on August 3, 1964. A copy of the charges and notice that the Respondent, in accordance with law, had five days in which to request a hearing were sent to the Respondent on August 4, 1964 by Certified Mail. By letter, dated August 6, 1964, Mr. William H. Engelman advised he and Mr. Sol C. Berenholtz would represent the Respondent and requested a hearing of the charges. On August 13, 1964, Mr. Milton R. Rothstein advised he would be co-counsel with Mr. Engelman.

On August 14, 1964, a letter was written by Mr. Engelman enclosing a Demand for Particulars on behalf of the Respondent, and the petition was forwarded to the Attorney General's Office. On August 27, 1964, notices were issued that the hearing would be held on September 25, 1964 at 10 a.m.

On September 17, 1964, Mr. Engelman requested a postponement of the hearing and receipt of information previously requested by him.

The hearing was postponed and was rescheduled for Tuesday, September 29, 1964 at 10 a.m. in the Office of the Commissioner of Personnel, Fifth Floor, 301 West Preston Street, Baltimore, Maryland, and all parties were notified.

The case came on for hearing at the time and place specified. The Complainant's case was presented by Mr. John W. Sause, Jr., Assistant Attorney General. The Respondent was represented by Mr. William Engelman and Mr. Milton R. Rothstein. The witnesses were duly sworn.

The witnesses for the State testified that the Respondent, from the time of her employment in the Municipal Court of Baltimore City until her assignment to her present position of handling postponements, had been a very satisfactory employee, and testified about the type work assigned to her during that period.

Due to personnel changes and in an attempt to provide work for which the Respondent was qualified, the handling of postponements was assigned to the Respondent. The employee, who previously handled this assignment, which she handled in approximately two hours each day, was requested to instruct the Respondent on the procedure to be followed. This employee noted that, several times, the Respondent made it clear she did not want this job, and the matter was finally taken up with the Chief Clerk, who advised he would take care of it.

Testimony was given regarding errors made by the Respondent in typing, spelling, in setting officers' days in Court, postponing only part of a case and in notifying witnesses. The Repondent's direct supervisor stated she had taken work back to the Respondent, but finally got to the point where she made the corrections herself. These errors caused inconvenience to the Police Department as well as embarrassment to the Court and inconvenience to the public.

There was testimony that the Respondent refused to take telephone calls. On July 9, 1964, the Respondent's immediate supervisor had difficulty with the Respondent due to her refusal to answer a telephone call for a postponement. As a result of this difficulty, the Respondent was taken to the Chief Clerk's office, and the supervisor recommended the Respondent be removed from her supervision.

There was also testimony on a grievance filed by the Respondent regarding reassignment of her duties. Following this grievance, on April 8, 1964, a memorandum was sent to the Respondent by the Chief Clerk informing her of her assigned duties and her immediate supervisors. On April 10, 1964, a letter was directed by the Respondent to the Chief Judge of the Municipal Court, with a copy to the Chief Clerk, regarding a letter received by the Respondent from the Chief Judge. The Respondent's letter ended with the following sentence: "I would appreciate if you do not annoy me with these ridiculous notes so I may do my work."

The International Representative of the American Federation of State, County, and Municipal Employees testified on a meeting he held with the Chief Clerk and Mrs. Gladys Lanassa regarding her membership in the Union. He also testified regarding the grievance of the Respondent, and added that, on July 17, 1964, he had arranged with the Chief Clerk for a meeting at 11 a.m. When he arrived, he found the Respondent and another employee had been suspended. He then had a meeting with the Chief Judge and the Chief Clerk about these suspended employees.

A Key Punch Operator, employed in the Municipal Court, testified she works in close proximity to the Respondent, and has never heard the Chief Clerk or the Respondent's immediate supervisor bring errors to the Respondent's attention or discipline her. Nothing had come to her attention that the Respondent was incompetent.

The Respondent testified she has been employed for approximately five years by the State, having worked at the Department of Motor Vehicles until July 1962, when she was transferred, at her request, to the Municipal Court due to the distance she had to travel to the Motor Vehicles Department.

The Respondent is divorced and has a twelve year old daughter.

The Respondent described the duties performed by her from the time she was employed by the Municipal Court until she was assigned to her present job.

The Respondent stated she was associated with the Heroes in The Line of Duty Association, and the Chief Judge had suggested she withdraw from the Association.

The Respondent then related an assignment, which involved the handling of money, and her dissatisfaction with this assignment, and the Chief Clerk's offer of a position of Cashier I. When she contacted her union representative, she was advised to file a grievance.

During the first week of April 1964, the Respondent had a grievance hearing with the Chief Judge, the Chief Clerk and the union representative, at which time it was her understanding she would have only postponements as her assigned duty.

On April 8, 1964, she received a letter from the Chief Judge and a memorandum from the Chief Clerk, and learned she had three jobs assigned to her. The Respondent was horrified and very angry, and so she wrote the letter on April 10th to the Chief Judge, with a copy to the Chief Clerk. The Respondent added she would not have sent such a letter now, but that neither the Chief Judge nor the Chief Clerk said anything to her about the letter.

In her defense, the Respondent stated the room in which she worked is overcrowded, she had been given no instruction in handling postponements, the work was scattered throughout the office, the other employees were uncooperative, and, furthermore, no one had handled the job of postponements without making mistakes. The Respondent also stated she had not been advised by her immediate supervisor or the Chief Clerk that she needed to improve in her work, and she had never been disciplined while working at the Municipal Court or in the State service.

Regarding the handling of telephone calls on postponements, the Respondent stated she was not told to answer the telephone; but, that, on several occasions, when she was so instructed, she took the calls.

The Respondent described the flare-up between her supervisor and herself on the answering of the telephone on July 9, 1964, and stated they went in to see the Chief Clerk, who suggested they sit down and discuss the matter calmly. The Respondent added she left the office before the suggested discussion as she thought her supervisor wanted to discuss another matter with the Chief Clerk.

DECISION

The testimony in this case clearly shows that the Respondent failed to perform the duties of her present position in a manner satisfactory to her supervisors, and that she made numerous errors, which resulted in a continuous embarrassment to the Court. The charge, under Rule 47A, "that the employee is incompetent or inefficient in the performance of his duty," is sustained.

The Commissioner feels that the letter, dated April 10, 1964, which was sent by the Respondent to the Chief Judge of the Municipal Court, was insolent and insubordinate and showed her complete disrespect of the Court. This was admitted by the Respondent, who expressed her regret, at the hearing, for having sent such a letter. The Respondent, therefore, is found in violation of Rule 47D.

It is held by the Commissioner that the other charges against the Respondent were not sustained.

Throughout the hearing, the Respondent's Counsel insisted that the charges to terminate her employment were prompted by her membership in the union. There is no evidence in the testimony to sustain this contention.

In his summation, the Respondent's Counsel stated "I don't suggest that Mrs. Melfa be returned to the second floor of the Municipal Court and work with these people who have charged her. * * * and the girl's efficiency is good and she can be put to profitable use in State service —I think it will have to be elsewhere in State service and not there." The Commissioner agrees with this statement. The testimony showed that the Respondent had performed satisfactorily in other positions in which she had been employed.

It Is, Therefore, Ordered that the services of the Respondent at the Municipal Court of Baltimore City be terminated effective on the date of her suspension, July 17, 1964, and that she be paid for any unused annual leave.

It Is Further Ordered that the Respondent's name be placed on the reinstatement list for Clerk-Typist I, so she may be given an opportunity for employment in any other State department requiring her services.

It Is Further Ordered that a copy of this order forthwith be sent to Judge T. Barton Harrington, Chief Judge of the Municipal Court of Baltimore City, and that it be enforced the same as required by law.

And It Is Further Ordered that a copy of this order be sent to the Respondent, Mrs. Norma M. Melfa.

/s/ RUSSELL S. DAVIS

Commissioner